In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 148

TIDE WATER ASSOCIATED OIL COMPANY,
Appellant,

vs.

L. G. ROBISON, on Behalf of OIL WORKERS INTERNATIONAL UNION LOCAL 445,
Appellee.

Petition for Rehearing After Order Granting Motion to Affirm

On October 13, 1952, this Court entered the following order:

> "PER CURIAM: The motion to affirm is granted and the judgment is affirmed. Day-Brite Lighting, Inc. v. Missouri, 342 U. S. 421. Mr. Justice Frankfurter and Mr. Justice Jackson are of the opinion that probable jurisdiction should be noted and the case set down for argument."

The Court, acting summarily, thereby held constitutional a California statute which entitles an employee, on the day

of an election, (a) to take two working hours off at full pay regardless of how much time he may have outside of working hours in which to vote, and (b) to walk out in unison with other employees at a time selected by themselves without regard for the convenience or necessities of their employer's business.

Appellant prays that the foregoing order be reconsidered, and that probable jurisdiction be noted and the case set down for argument, on the ground that this case is not controlled by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, but presents substantial questions of the utmost public importance which were neither presented, considered nor decided in the *Day-Brite* case, but which, on the contrary, were expressly reserved for future decision. More particularly:

REASONS FOR GRANTING THIS PETITION FOR REHEARING

By its order above quoted, the Court, in effect, has held that the *Day-Brite* case is so plainly controlling of the present as to render the appeal herein unsubstantial and frivolous. In this, we submit, the Court was mistaken for two reasons.

I. The Missouri statute upheld by this Court in the *Day-Brite* case adopts a standard of four hours as reasonably calculated to assure all employees of an opportunity to vote and entitles an employee only to such time off from work as may be required to fill out the four hours. In short, the employee's right to time off under the Missouri statute is dependent on how much time he has outside of working hours in which to vote. In contrast, the California

statute, as construed below, grants every employee two working hours off regardless of how much time he may have outside of working hours in which to vote. Thus, a night shift employee whose regular quitting time is 9:00 A.M. and who has all of the rest of the day (ten hours) in which to vote, nevertheless is entitled to take the two hours off between 7:00 A.M. and 9 A.M., with pay.

In the *Day-Brite* case the Missouri courts, like this Court, upheld the constitutionality of the Missouri statute as they had construed it. In doing so they expressly rejected as constitutionally objectionable the very construction which this Court now says was upheld by it in its *Day-Brite* decision. In this connection the Missouri Court of Appeals said:

> "Suppose the employee is working on a shift from 4:00 A. M. to 12:00 noon. If the State is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his job until 12:00 noon and then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day thirteen hours.
>
> "If the views of the State are correct there would indeed be a constitutional question involved * * * because of an unnecessary, arbitrary and unreasonable burden being visited upon the employer * * * State v. Day-Brite Lighting, Inc., 220 S. W. 2d 782, 786."

Obviously, a statutory construction which had been explicitly rejected by the Missouri courts in the *Day-Brite* case could not have been before this Court in that case for constitutional review.

Not only is it a fact that the statutory construction placed in issue by the present appeal was not before this Court in the *Day-Brite* case, but it also is a fact that this Court, in that case, expressly limited its constitutional blessing to the particular statutory scheme which it had before it and reserved cases such as the present for future decision. In this connection the Court declared:

> "Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity." (342 U. S., at 424.)

The California statute involved in the instant appeal presents the very case of an employer being required "to pay wages for a period that has no relation to the legitimate end" which this Court, in the *Day-Brite* case, left for future decision. Under the California statute one employee may be entitled to a total of four hours in which to vote, another to a total eight hours, and another to a total of twelve hours, although all work in the same place, live in the same place and vote at the same poll. The time granted by the California statute thus is fixed arbitrarily and capriciously without any relation whatever either to the need of the individual or to any more general standard.

The Missouri statute provides in substance that an employee's work shall not be permitted to interfere with his having a standard opportunity for voting, thus being "designed," in the words of this Court, "to remove a practical obstacle to getting out the vote" (342 U.S. at 424). The California statute is not designed to remove a practical obstacle to getting out the vote; it provides that employees

in all circumstances shall be entitled to vote on their employer's time and at their employer's expense, and it is designed simply to compel the employer to subsidize the employee in the latter's exercise of his voting privilege.

The foregoing differences between the California and Missouri statutes are not unsubstantial or insignificant. On the contrary, they are so substantial and significant that they were responsible for the rejection of the California statutory construction as constitutionally objectionable by the Missouri Court of Appeals in the *Day-Brite* case. They are so substantial and significant that in every instance in which a state court of last resort has passed upon a statute construed like that of California, the statute has been held unconstitutional. *Illinois Central R. Co. v. Commonwealth,* 305 Ky. 632, 204 S.W.2d 973; *People v. Chicago, M. & St. P. R. Co.,* 306 Ill. 486, 138 N.E. 155.

To summarize, the statutory construction placed in issue by the present appeal was not before this Court in the *Day-Brite* case, but, on the contrary, had been expressly rejected by the Missouri courts in that very case as constitutionally objectionable. The constitutional question presented by that construction is the very question which this Court, in the *Day-Brite* case, declared that it was reserving for future decision. And the question is so substantial that in every instance in which it has been presented to the higher courts of a state, it has been answered with a holding that the statute was unconstitutional.

We do not see how, under these circumstances, it can be said that the question presented by the present appeal was decided by this Court in the *Day-Brite* case. Certainly, we submit, the matter is not so plain as to deprive appellant

of the right to present its appeal. The question is substantial and merits this Court's consideration.

II. The Missouri statute expressly provides that the "employer may specify the hours during which such employee may absent himself,"* and in the *Day-Brite* case the time taken off by the employee was in fact specified by the employer. In contrast, the California statute, as construed below, does not permit the employer to schedule the absences, but entitles the employees to walk out in unison at any time they may choose, and this is what the employees involved in the instant case in fact did.

Patently, the constitutional question presented by this aspect of the California statute was not before this Court in the *Day-Brite* case, and this Court did not pass thereon.

The question, we submit, is substantial. The California statute imposes a much greater burden upon the employer than the simple payment of wages for the time taken off; he may suffer a complete shut-down of his plant or a department thereof, as in the instant case, with consequent loss of production and other damage which could be calamitous. The statute in this respect is purely mischievous; the burden which it places on the employer is unreasonable and wholly unrelated to any legitimate end.

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*The statute is quoted in full in a footnote in this Court's opinion in the *Day-Brite* case at 342 U.S. 442.

CONCLUSION

The present case presents questions which were neither presented, considered nor decided by this Court in the *Day-Brite* case. We submit that those questions are substantial and deserving of this Court's mature consideration; Appellant certainly should not be deprived of its right to present them on appeal upon the ground that they have already been decided in the *Day-Brite* case.

For the foregoing reasons we submit that this petition for rehearing should be granted.

MARION B. PLANT
BROBECK, PHLEGER & HARRISON
Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MARION B. PLANT

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Appellee.

OPPOSITION TO PETITION FOR REHEARING AFTER ORDER GRANTING MOTION TO AFFIRM.

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Subject Index

	Page
Reasons for refusing to grant the petition for rehearing.....	1
Conclusion	3

Table of Authorities Cited

	Page
Missouri v. Day-Brite, 342 U.S. 421.....	2
State v. Day-Brite Lighting, Inc., 220 S.W. (2d) 782.....	2

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OPPOSITION TO PETITION FOR REHEARING AFTER ORDER GRANTING MOTION TO AFFIRM.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

REASONS FOR REFUSING TO GRANT THE PETITION FOR REHEARING.

Appellant has produced no new points in his petition for rehearing.

Appellant's argument regarding the statutory construction placed by the Missouri Courts on its statute in *State v. Day-Brite Lighting, Inc.*, 220 S.W. (2d) 782 was urged by him in every phase of this present litigation. He disregards the fact that the quoted segment of the Missouri decision was dicta (see Appellant's Petition for Rehearing, page 3) and conjectural. Obviously, any quotation from any judicial decision beginning with the word suppose cannot be anything but conjectural.

Appellant's arguments throughout the course of the present litigation disregard, also, the fact that the Missouri statute has a four-hour period of time off. This double amount of time off over that allowed by the California statute could well make it necessary that the Missouri Courts interpret their statute differently without giving rise now to Constitutional issues.

Appellant's principal objection to the California statute still seems to amount to a lack of desire to "subsidize the employee in the latter's exercise of his voting privilege". Appellant's Petition for Rehearing, page 5.) Certainly this issue has been clearly, once and for all, settled by this Court's decision in *Missouri v. Day-Brite* (342 U.S. 421). The urging, once again, of this point on the Court is certainly very frivolous. Appellee's position is that the only constitutional issue in any of these voting cases is the requirement of the various statutes that the time off must be with pay. The Court has clearly resolved

this issue in favor of the employees. Similarly the argument of appellant that the statute should be interpreted to provide that the employee should first consult his employer and that the employer should provide the time off at the employer's convenience has been urged and disregarded.

CONCLUSION.

If appellant's arguments were to be incorporated into the present California statute the restrictive quality of such law would be so severe as to defeat the great public policy in favor of the voting franchise. If the law were to require each individual employee to make out a case of individual hardship in order to take time off to vote there would be placed such a great burden on the employee that the statute would have no value toward promoting the sacred right to vote.

Dated, Martinez, California,
November 3, 1952.

Respectfully submitted,
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